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No. 03-857

Supreme Court, U.S.
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In The
Supreme Court of the United States

R. VANKE, et al.,

Petitioners,

vs.

LEROY BACA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Rather than demonstrating any appropriate ground for review, Plaintiffs/Petitioners ("Plaintiffs") present the instant Petition for Writ of Certiorari by making various blatant misstatements of both fact and law. Pursuant to Rule 15 of the Rules of the United States Supreme Court, Defendant/Respondent Los Angeles County Sheriff Lee Baca ("Defendant") points out and addresses these misrepresentations.

The unpublished decision Plaintiffs seek review of is well-founded and consistent with the clear and unambiguous language of 42 U.S.C. § 1997e(d), the attorney's fees provisions of the Prison Litigation Reform Act ("PLRA"), and all prior cases that have applied this subsection. There is no conflict among the federal or state courts regarding the application of this particular subsection of the PLRA. In short, the standards of Rule 10 of the Rules of the United States Supreme Court have not been met and this Petition should be denied.

Plaintiffs in this case, on behalf of themselves and an alleged class of persons similarly situated, alleged that "it is probable that they and each of them will be held illegally in County custody after a judicial officer dismisses all then-pending criminal charges against plaintiffs, *for the prohibitive purpose of checking for warrants, wants, and holds*"[1] and sought equitable relief in this regard.

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[1] The instant action was filed shortly after a decision in another matter handled by both counsel for Plaintiffs and counsel for Defendant herein, *Fowler v. Block*, U.S.D.C. Case No. CV 97-2098 WJR (Ex), was published. *Fowler v. Block*, 2 F.Supp.2d 1268 (C.D. CA 1998).

(Continued on following page)

In November of 1998, the District Court in the instant case issued an Order on Plaintiffs' motions for class certification and preliminary injunction and on Defendant's motion to dismiss. (Appendix, hereinafter "App." 27-72.) The District Court granted a preliminary injunction, based on the holding in *Fowler*, limited to precluding the Los Angeles County Sheriff's Department ("LASD")

> from holding individuals who have been acquitted of the charges on which they are being held, or whose release has been ordered by a court, beyond the period of time that is required to perform the administrative steps incident to release, including a check for wants and holds known to the defendants at the conclusion of the

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Specifically, the plaintiff in *Fowler* alleged that he was overdetained in violation of his constitutional rights and sought damages for the alleged overdetention. The defendants in *Fowler* argued that the alleged overdetention was not a constitutional violation, but rather part of the necessary steps in performing the administrative discharge of an incarcerated person.

The Court in *Fowler* recognized that "[a]dministrative steps are a necessary part of an inmate's ordered release and can certainly be found reasonable under a qualified immunity analysis." *Id.* at 1277-78. Moreover, *Fowler* "recognize[d] that the administrative tasks incident to a release of a prisoner from custody may require some time to accomplish – in this case, perhaps a number of hours. Reasonable time must be allowed for such matters as transportation, identity verification, and processing . . . even if the current procedures are inefficient and time-consuming, they nonetheless must be undertaken incident to a person's release." *Id.* The Court even recognized that a delay of 24 to 48 hours "due to administrative release procedures cannot be found unreasonable," however, to the extent that there was evidence that defendant's administrative release procedures were delayed by an additional check for warrants and holds after the other administrative steps incident to release had been completed, the Court declined to award summary judgment. *Id.* at 1279.

> administrative steps incident to release, but not including additional time for the receipt or processing of wants and holds not known to the defendants at the conclusion of the administrative steps incident to release.[2]

(App. 71-72.)

Following the issuance of the preliminary injunction in November, 1998, the LASD modified its release procedures in accordance with the preliminary injunction and has been in compliance with the preliminary injunction ever since. (App. 2.) Moreover, the policies and procedures at the Los Angeles County Jail are continually improved and refined to expedite the entire release process and prevent detentions of inmates beyond their legal release date. (*Id.*) Indeed, the LASD has no intention of instituting any future policy or procedure that would have been prohibited by the preliminary injunction even though a subsequent Ninth Circuit decision found that the procedure prohibited by the preliminary injunction was in fact constitutional.[3] (*Id.*) The District Court ultimately dismissed the preliminary injunction as moot based on the modification of the relief procedures. (*Id.*)

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[2] Consequently, and despite Plaintiffs' attempt to suggest that the relief granted was broader, the class of Plaintiffs in the instant case was and is so limited. A named plaintiff cannot represent a class alleging constitutional claims that the named plaintiff does not have standing to raise, and it is not enough that the class members share other claims in common. *O'Shea v. Littleton*, 414 U.S. 488, 493-94, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001).

[3] *See, Brass v. County of Los Angeles*, 328 F.3d 1192, 1201 (9th Cir. 2003).

Plaintiffs filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 1988. Defendant opposed the motion on various grounds. Relevant to the Petition for Writ of Certiorari in the instant case, Defendant opposed the attorney's fees motion on the grounds that Plaintiffs failed to prove an *actual violation* of their rights as required by the PLRA, 42 U.S.C. § 1997e(d).

Based on its earlier ruling granting the preliminary injunction in which the District Court held that subsection (a) of the PLRA did not apply because the instant case did not involve "prison conditions," the District Court did not apply subsection (d) and awarded Plaintiffs attorney's fees.[4] (App. 5-26.) Defendant's opposition to the motion for attorney's fees, however, relied on a *different* section of the PLRA, subsection (d), which expressly applies to *any* action brought by "prisoners" regardless of whether or not it pertains to "prison conditions." The Ninth Circuit in the instant case correctly held that the District Court erred in bootstrapping its prior holding (based on the narrower subsection (a) of the PLRA) and not addressing the applicability of subsection (d) of the PLRA to Plaintiffs' motion for attorney's fees. (App. 3.) Subsection (d) of the PLRA, which applies to "any" action, bars Plaintiffs from obtaining attorney's fees because they never proved that their constitutional rights were "actually violated" as required

[4] In its Order granting the preliminary injunction, the District Court rejected Defendant's argument that subsection (a) of the PLRA should have applied to require that Plaintiffs exhaust their administrative remedies before filing the instant lawsuit. In doing so, the District Court found that the instant case did not relate to "prison conditions" and thus subsection (a) of the PLRA was not applicable. In its Order awarding attorney's fees, the District Court relied on its previous Order applying the narrower subsection (a) of the PLRA. (App. 16.)

by this provision. The Petition is therefore meritless because it mis-cites and misinterprets the PLRA by suggesting that the "prison conditions" limitation under subsection (a) of the PLRA applies to subsection (d) of the PLRA which, by its express language, applies to "any action."

Plaintiffs urge the Court to grant certiorari, contending that the unpublished Ninth Circuit decision below creates a conflict among the circuit courts. This is a blatant misrepresentation since the Second and Eighth Circuit cases cited by Plaintiffs did not address the specific subsection of the PLRA at issue in the instant case, 42 U.S.C. § 1997e(d). The cases relied upon by Plaintiffs all addressed the exhaustion of administrative remedies requirement under subsection (a) of the PLRA which, by its express language, applies to only prisoner suits involving "prison conditions," unlike the broader language under subsection (d) regarding attorney's fees limitations which applies in "any action." Plaintiffs have not and cannot point to any Circuit case that has held that subsection (d) of the PLRA only applies in "prison conditions" litigation.

ARGUMENT

I. THE UNPUBLISHED NINTH CIRCUIT DECISION BELOW APPLIED 42 U.S.C. § 1997e(d) BASED ON ITS EXPRESS LANGUAGE AND THE RULES OF STATUTORY CONSTRUCTION SET FORTH BY THIS COURT.

The PLRA was signed by the President on April 26, 1996 and was adopted in an attempt to quell the torrent of frivolous and abusive litigation conducted by prison inmates. The government's interest in enacting the PLRA

was "to curtail frivolous prisoners' suits and to minimize the costs – which are borne by taxpayers – associated with those suits." *See, Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999). Toward that end, the PLRA contains restrictions on the availability of attorney's fees for prisoner lawsuits.

Section 803(d) of the PLRA enacted 42 U.S.C. § 1997e, which significantly curtails the availability of attorney's fees and prison litigation under 42 U.S.C. § 1988. Under the PLRA, a prisoner who is a "prevailing party" under section 1988 is not presumptively entitled to an award of attorney's fees as are most section 1988 prevailing plaintiffs. Specifically, subsection (d)(1)(A) of 42 U.S.C. § 1997e expressly states that "fees shall *not* be awarded, *except* to the extent that – the fee was directly and reasonably incurred in *proving an actual violation of the plaintiff's rights* protected by a statute pursuant to which a fee may be awarded under section 1988 of this title . . . " (Emphasis added.) Reading the "prison conditions" limitation from *other* subsections of the PLRA into subsection (d) would render Congress' use of the modifier "any" in subsection (d) meaningless. The Ninth Circuit decision Plaintiffs seek review of applied the rules of statutory construction set forth by the Supreme Court and followed the clear and unambiguous language of subsection (d) of the PLRA (regarding limitations on attorney's fees awards) which, by its express terms, applies in "any action" brought by prisoners.

There is a presumption that Congress acted intentionally and purposefully in varying the modifier in subsection (d) of the PLRA to apply to "any" action, not just those involving "prison conditions." The rules of statutory construction dictate that subsection (d) of the PLRA not be limited to cases involving "prison conditions."

In resolving the question of statutory interpretation, courts must first look to the express language of the statute itself. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 237, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000) ("We begin, as we must, with the language of the statute.") (citing *Bonilla v. Muebles J. J. Alvarez, Inc.*, 194 F.3d 275, 277 (1st Cir. 1999)). Statutes must be read in a "straightforward" and "commonsense" manner. *Hubbard v. United States*, 514 U.S. 695, 699-703, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995). *"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." United States v. Gonzales*, 520 U.S. 1, 5-6, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (emphasis added).

Like the instant case, *Gonzales* involved interpretation of a statute with varying modifiers in its subsections. The particular subsection of the statute at issue in *Gonzales* contained the modifier "any" in the context of a statute that contained other subsections that were more restrictive. Rejecting the argument that the more restrictive language from the other subsections in the statute should be applied in the particular subsection at issue (Plaintiffs' argument in the instant case), the Supreme Court stated: "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* at 5 (citing Webster's Third New International Dictionary 97 (1976).) Moreover, "[g]iven the straightforward statutory command, there is no reason to resort to legislative history." *Id.* at 6 (citing *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117

L.Ed.2d 391 (1992)). "Indeed, far from clarifying the statute, the legislative history only muddies the waters." *Id.*

Several years after *Gonzales*, the Supreme Court faced the same issue of statutory construction in *Gutierrez v. Ada*, 528 U.S. 250, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000). Specifically, at issue was the language of the Organic Act of Guam, 48 U.S.C. § 1422. A number of limitations throughout the subsections of that Act refer to the term "general election" while the particular subsection at issue in the *Gutierrez* case refers to "any election." Noting that when Congress varies a modifier in a statute, it would hardly intend to mean the same thing under the subsection with the varied modifier, the Supreme Court applied the subsection to refer to "any election" notwithstanding the fact that many other provisions in the statute were limited to a "general election."

Applying the rules of statutory construction applied in *Gonzales* and *Gutierrez*, it is evident that Congress would not have used the language in subsection (d) of the PLRA "in *any* action" (emphasis added) if it meant to limit that provision to only cases involving prison conditions when it could have just as easily used the same language as other subsections (e.g., subsection (a)) of the PLRA. Plaintiffs' interpretation of subsection (d) renders Congress' use of the modifier "any" meaningless.

II. THE UNPUBLISHED NINTH CIRCUIT DECISION BELOW IS CONSISTENT WITH OTHER CASES APPLYING THE ATTORNEY'S FEES PROVISIONS OF THE PLRA UNDER 42 U.S.C. § 1997e(d).

Plaintiffs' suggestion that the Ninth Circuit decided the issue contrary to the clear statutory language and controlling precedent of this Court is a blatant misrepresentation. As set forth, *infra*, the clear and unambiguous language of the attorney's fees provisions of the PLRA indicates that these provisions apply in "any action" as opposed to other provisions of the PLRA which are limited to "prison conditions" litigation. Plaintiffs have not and cannot point to any decision by any court that has limited the applicability of subsection (d) of the PLRA to "prison conditions" litigation.[5] Such an application of the PLRA would ignore its express language.

The Fourth Circuit recently rejected an argument that Congress intended the restrictions on the recovery of attorney's fees to be applicable solely to prisoners and their lawyers bringing lawsuits challenging the *conditions of the prisoner's imprisonment*, holding that the argument was "at odds with the plain language of the statute." *See*, *Montcalm Publishing Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 171 (4th Cir. 1999). The Court then reiterated that the "PLRA expressly imposes limitations on the amount of attorney's fees awarded 'in any action brought

[5] None of the cases cited by Plaintiffs addressed the applicability of subsection (d) of the PLRA. To the contrary, the cases cited by Plaintiffs addressed other subsections of the PLRA, which are expressly limited to "prison conditions" litigation.

by a prisoner who is confined to any jail, prison, or other correctional facility.'" *Id.* at 171-72 (citing 42 U.S.C. § 1997e(d)(1)).

In fact, relying on *Gonzales* and its rule of statutory construction, the Ninth Circuit in *Oliver v. Keller*, 289 F.3d 623, 627-28 (9th Cir. 2002) applied the *plain language* of the PLRA to subsection (e) defining the term "physical injury." In this regard, the Ninth Circuit stated that "if Congress had meant that 'any' physical injury was sufficient to permit a prisoner's mental and emotional injury, it could have said as much." *Id.* at 627 (citing *United States v. Gonzales*, *supra*, 520 U.S. at 6.)

More on point to the instant case, and as further evidence that the PLRA's subsections act *independently*, prior to the instant case, the Ninth Circuit applied subsection (d) of the PLRA to a lawsuit that, by no stretch of the imagination, could be described as a "prison condition" lawsuit. *See*, *Siripongs v. Davis*, 282 F.3d 755 (9th Cir. 2002).

Like the instant case, the plaintiff in *Siripongs* obtained preliminary equitable relief, but there was never a finding that the plaintiff's rights were *actually violated*. In denying the plaintiff attorney's fees, *Siripongs* applied subsection (d) of the PLRA based on its plain meaning and implicitly rejected the assertion that the subsection applies only to lawsuits involving "prison conditions." In this regard, *Siripongs* held:

> In interpreting the [PLRA] statute we look to general principles of statutory construction and begin with the language of the statute itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 103 L.Ed.2d 290, 109 S.Ct. 1026 (1989).

> Because we believe the PLRA's language is clear on its face, 'the sole function of the court [ ] is to enforce it according to its terms.' *Id.*

Id. at 758.

Consistent with the rules of statutory construction set forth by the Supreme Court in *Gonzales* and *Gutierrez*, and the application of the PLRA in *Siripongs*, it has been held that "the [PLRA] statute's provisions act *independently*" and, depending on the particular subsection of the statute at issue, may or may not be subject to the "prison conditions" limitation. *See*, *Turner v. Schultz*, 130 F.Supp.2d 1216 (D. CO 2001) (certain subsections of the PLRA apply to cases not involving prison conditions) (emphasis added).

The PLRA limitations on attorney's fees under 42 U.S.C. § 1997e(d) have been applied by courts to preclude an award of attorney's fees in cases like the instant case where a prisoner plaintiff may arguably be considered a "prevailing party," however, is not entitled to attorney's fees because there was never proof that the plaintiff's rights were ever "actually violated." *See*, *Siripongs*, *supra*.

Similarly, in *Waterman v. Farmer*, 84 F.Supp.2d 579 (D. NJ 2000), a class of plaintiffs challenged the constitutionality of a New Jersey statute and, in that regard, obtained an order preliminarily enjoining enforcement of the statute. Subsequently, the district court found the statute to be unconstitutional and *permanently enjoined* its enforcement. Thereafter, and before entry of judgment, the State of New Jersey published proposed rules clarifying the scope of the challenged statute so that it would be consistent with the court's injunction. Shortly thereafter, the plaintiff sought attorney's fees pursuant to

42 U.S.C. § 1988. Their argument was that "although they ultimately failed to obtain a judgment on the merits in their favor, their lawsuit was the 'catalyst' that prompted New Jersey officials to promulgate regulations clarifying the statute's scope." *Waterman*, *supra*, 84 F.Supp.2d at 582. Holding that the plaintiffs were not entitled to an award of fees, *Waterman* stated, in pertinent part:

> In making the determination as to whether a plaintiff is 'prevailing,' § 1988 *must be read in conjunction with the PLRA*. In doing so, it is clear that the PLRA conditions an award of attorney's fees in prisoner civil rights suits on a determination that a plaintiff's rights have actually been violated, thereby abrogating the judicially-created catalyst doctrine.
>
> The Court notes that under the normal rules of statutory construction, if Congress intends for legislation to change the interpretation of a judicially-created concept, it makes that intent specific. *See Astoria Fed. Sav. & Loan Ass'n. v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles. . . . Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.") *Indeed, both the plain language of the PLRA and its legislative history demonstrate Congress' intent to eliminate the catalyst theory in prisoner civil rights cases.*

Waterman, *supra*, 84 F.Supp.2d at 586 (emphasis added). Subsection (d) of the PLRA "has the effect of reducing attorney fee awards by eliminating fees for litigation other

than that necessary to prove a violation of a federal right." *Id.* at 587 (citing H.R. Rep. No. 21, 104th Cong., 1st Sess. 1995).

More recently, in *Green v. Peters*, 2002 U.S. Dist. LEXIS 11671 (N.D. IL 2002), an inmate filed a lawsuit alleging that various prison officials violated his First Amendment rights by denying him access to various publications. Ultimately, the parties entered into a consent decree that prohibited the defendants from restricting inmates' access to certain non-legal publications. The defendants then adopted a rule which was found in violation of the consent decree. Consequently, the court then issued a permanent injunction. Denying attorney's fees, however, *Green* stated that a "plain reading of this language [referring to subsection (d) of the PLRA] makes clear that the PLRA conditions an award of attorney's fees in prisoner civil rights cases on a determination that the prisoner's rights *have actually been violated*." *Id.* at *26-27 (citing *Waterman, supra*, 84 F.Supp.2d at 586.)

The Ninth Circuit in the instant case applied subsection (d) of the PLRA "according to its terms" and consistent with the prior applications of this section in *Waterman*, *Green* and *Siripongs*. Plaintiffs have not and cannot point to any binding precedent that has held that *subsection (d)* of the PLRA is limited to "prison conditions" litigation.

III. CONCLUSION.

While certain subsections of the PLRA do not apply to non-prison conditions litigation, based on its express language and the rules of statutory construction set forth by the Supreme Court, subsection (d) clearly does. Accordingly, the Ninth Circuit correctly applied subsection (d) of

the PLRA in finding that Plaintiffs were precluded from an award of attorney's fees. Based on the foregoing, certiorari should be denied.

Respectfully submitted,

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